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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

Question of the impunity of perpetrators of violations of human rights (civil and political rights): final report prepared by Mr. L. Joinet, pursuant to Subcommission resolution 1995/35

CONTENTS

		Paragraphs	Page
INTRODUCTION		1 - 7	2
I.	BACKGROUND TO THE REPORT	8 - 15	3
II.	GENERAL PRESENTATION	16 - 24	4
III.	PROPOSALS AND RECOMMENDATIONS	25	5
IV.	CONCLUSION	26 - 27	5

Annexes

I.	Synoptical table of the set of principles for the protection and promotion of human rights through action to combat impunity	6
II.	Set of principles for the protection and promotion of human rights through action to combat impunity	9

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INTRODUCTION

1. This final report proposes a different approach from that generally used. It is almost six years since the Subcommission decided (August 1991) to undertake a study on the impunity of perpetrators of violations of human rights. The delay is due primarily to the decision taken halfway through the process to extend the study to cover violations of economic, social and cultural rights, and then to split it into two aspects, each dealt with by one of the original co-authors. It therefore seemed timely, as concerned the section on civil and political rights, which has been entrusted to the author of the present report, to present a final version of it in the form of a summary of both the preliminary report and the progress report - to which the reader is referred - entitled "Set of principles intended to strengthen action to combat impunity". This approach also enables the General Assembly's call for a significant reduction in the length of reports to be rigorously heeded.

2. The set of principles basically reproduces the guidelines proposed in paragraphs 127 and 130 of the preliminary report (E/CN.4/Sub.2/1993/6), which the Subcommission welcomed in its resolution 1993/37. The principles rest on three fundamental rights of victims: the right to know, the right to justice and the right to reparation, which are dealt with in the first three chapters of the set of principles. Their drafting was greatly facilitated by comments from Governments and non-governmental organizations, in reply to a note verbale of 10 December 1992. All of them are to be thanked.

3. These thanks are addressed in particular to the Subcommission's former Special Rapporteur on the right to restitution, compensation and rehabilitation, Mr. Theo van Boven. It should be recalled that in the preliminary report submitted to the Subcommission (para. 131.1), it was recommended that "the final report should take greater account of the suggestions made by Mr. van Boven in his study (E/CN.4/Sub.2/1992/8) concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms".

4. In conformity with that recommendation, it was proposed in paragraph 8 of the progress report (E/CN.4/Sub.2/1995/18), that "consideration should be given firstly to that part of the above-mentioned study by Mr. van Boven (E/CN.4/Sub.2/1993/8) entitled 'Individuals and collectivities as victims' (paras. 14 and 15), as well as chapter VII, 'The issue of impunity in relation to the right of reparation for victims of gross violations of human rights', and chapter IX, 'Proposed basic principles and guidelines', especially general principle 7".

5. At its forty-seventh session (August 1995), the sessional working group on the administration of justice and the question of compensation, which is chaired by Mr. Joinet in his capacity as a member of the Subcommission, considered the "Basic principles and guidelines", with the participation of Mr. van Boven. The comments of the sessional working group are reflected to a great extent in the proposal annexed to the present report.

6. These "Basic principles and guidelines" were definitively revised during a meeting of experts (Geneva, 20-22 February 1996) organized under the auspices of the Centre for Human Rights. The author of the present report

took part in this meeting, which was held under the chairmanship of Mr. van Boven at the initiative of the International Commission of Jurists and the Maastricht Centre for Human Rights of the University of Limburg.

7. It will be noted that, in this document, the "Basic principles and guidelines" have been reproduced as drafted by the expert meeting; except for some editorial changes, they have been incorporated into the "Set of principles" proposed as a basic reference for States involved in combating the impunity of perpetrators of violations of human rights, entitled "Set of principles for the protection and promotion of human rights through action to combat impunity".

I. BACKGROUND TO THE REPORT

8. In order better to understand this proposal, this report should be placed within the framework of the work of the Subcommission.

9. Thirty-eighth session (August 1985). Presentation by Mr. Joinet, in his capacity as Special Rapporteur on amnesty, of a final report entitled "Study on amnesty laws and their role in the safeguard and promotion of human rights" (E/CN.4/Sub.2/1985/16/Rev.1). The present report to a large extent draws on chapter III of that study.

10. Forty-third session (August 1991). In its decision 1991/110, the Subcommission asked two of its members, Mr. El Hadji Guissé and Mr. Joinet, to draft a working paper on the approaches that a study on impunity might take.

11. Forty-fourth session (August 1992). Following the submission of the working paper (E/CN.4/Sub.2/1992/18), the Subcommission decided, by its resolution 1992/23, to request the co-authors to draft a study on the impunity of perpetrators of violations of human rights. The Commission on Human Rights (in resolution 1993/43) and the Economic and Social Council (in decision 1993/266) approved this action.

12. Forty-fifth session (August 1993). Upon presentation of the preliminary report - and not the "progress" report as erroneously indicated (E/CN.4/Sub.2/1993/6) - the Subcommission requested the co-authors to extend their study to serious violations of economic, social and cultural rights.

13. Forty-sixth session (August 1994). After welcoming the preliminary report on the impunity of perpetrators of human rights violations (economic, social and cultural rights) (E/CN.4/Sub.2/1994/11 and Corr. 1), the Subcommission decided to split the study in two, entrusting Mr. Joinet with the aspect of civil and political rights and Mr. Guissé with that of economic, social and cultural rights, and noting that the two reports would be considered subsequently:

(a) The first under the agenda item entitled "The administration of justice and the human rights of detainees";

(b) The second under the agenda item entitled "The realization of economic, social and cultural rights".

14. Forty-seventh session (August 1995). Through its resolution 1995/35, the Subcommission welcomed with satisfaction the progress report by Mr. Joinet (E/CN.4/Sub.2/1995/18), which contained a summary of comments on certain matters of principle, and requested him to submit his final report in August 1996, at its forty-eighth session.

15. Forty-eighth session (August 1996). This final report is submitted to the Subcommission at its present session in accordance with the above-mentioned resolution.

II. GENERAL PRESENTATION

16. The set of principles consists of five parts.

17. Part I comprises the preamble, which recalls the United Nations texts under which this initiative is proposed. The reference to recommendation II.91 (on combating impunity) of the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights (Vienna, June 1993) should be particularly stressed.

18. Part II contains several definitions essential for the interpretation of the principles. These concern the terms "impunity"; "reference period" - which concerns the period during which impunity prevailed - and "grave crimes under international law", which covers crimes identified as such both by international human rights law and by international humanitarian law, namely, crimes against humanity, war crimes and grave breaches of the Geneva Conventions of 12 August 1949 and Protocols I and II of 8 June 1977.

19. The next three parts, which comprise the main substance of the text, are devoted, respectively, to rights which, as the rights of victims, constitute the basis for combating impunity: the right to know, the right to justice and the right to reparation.

20. Part III concerns the right to know. It first sets out general principles such as the right to the truth and the duty to remember. It then focuses on two proposals: the prompt creation of extrajudicial commissions of inquiry as a preliminary stage in establishing the truth, particularly when it has previously been denied, and urgent steps to be taken with regard to the preservation of, and access to, the archives of the reference period.

21. Part IV, on the right to justice, also discusses several general principles and then deals with the assignment of jurisdictions to national courts, foreign courts and international courts, paying particular attention to the importance of norms of universal jurisdiction. A second subsection contains a series of principles (principles 27 to 35) enumerating restrictions which are admissible because they are aimed at avoiding the application of certain rules of law in a manner that would encourage impunity. These have to do with prescription, amnesty, the right of asylum, extradition, exclusion of the *in absentia* procedure, due obedience, the irremovability of judges, and military courts.

22. Part V on the right to reparation, taken in the broadest sense (see paras. ... to ... above), is composed of three subsections dealing, respectively, with:

(a) General principles: rights and duties of victims and States. Who is entitled to the right to reparation? What procedures are applicable and how should they be publicized?, etc.;

(b) Individual measures to implement the three components of the right to reparation, namely, the right to restitution, the right to compensation and the right to rehabilitation;

(c) General and collective measures, such as measures of satisfaction (recognition by the State of its responsibilities, annual payment of damages to the victims) and guarantees of non-repetition (disbanding of militias of all kinds, repeal of emergency legislation, abolition of emergency courts, administrative measures to be taken in respect of State officials who collaborated and guarantees which they must be afforded).

23. Part VI contains an interpretative provision stating that the definition of the "reference period" cannot be interpreted as exempting or having exempted States from the implementation and observance of the set of principles during the reference period.

24. The attached annex contains the text of the "Set of principles for the protection and promotion of human rights through action to combat impunity", preceded by a synoptical table designed to make it easier to use.

III. PROPOSALS AND RECOMMENDATIONS

25. It is proposed that, after having considered the present report in the light of the two preceding reports, the Subcommission should transmit it to the Commission on Human Rights, with comments for submission to the Economic and Social Council and to the General Assembly on the basis of the usual procedure.

IV. CONCLUSION

26. "From the origins of mankind until the present day, the history of impunity is one of perpetual conflict and strange paradox: conflict between the oppressed and the oppressor, civil society and the State, the human conscience and barbarism; the paradox of the oppressed who, released from their shackles, in their turn take over the responsibility of the State and find themselves caught in the mechanism of national reconciliation, which moderates their initial commitment against impunity". This statement, which introduced the preliminary report submitted to the Subcommission in 1993, could well be cited as a conclusion.

27. The proposal being made by the Special Rapporteur must not be seen as an obstacle to national reconciliation, but rather as a means of avoiding distortions so that, once beyond the first stage of "conciliation", it may be possible to build the foundation for just and lasting reconciliation.

Annex I

SYNOPTICAL TABLE OF THE SET OF PRINCIPLES FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS THROUGH ACTION TO COMBAT IMPUNITY

I. PREAMBLE

II. DEFINITIONS

"Impunity", "reference period", "crimes under international law"

III. THE RIGHT TO KNOW

A. General principles

Principle 1: The inalienable right to the truth

Principle 2: The duty to remember

Principle 3: The victims' right to know

Principle 4: Guarantees to give effect to the right to know

B. Extrajudicial commissions of inquiry

Principle 5: Role of the extrajudicial commissions of inquiry

Principle 6: Guarantees of independence and impartiality

Principle 7: Definition of the commissions' terms of reference

Principle 8: Guarantees for persons implicated

Principle 9: Guarantees for witnesses and victims

Principle 10: Operation of the commissions

Principle 11: Advisory functions of the commissions

Principle 12: Publicizing the reports of the commissions

C. Preservation of and access to reference period archives

Principle 13: Measures for the preservation of archives

Principle 14: Administrative measures relating to archive inventories

Principle 15: Administration of archive centres

Principle 16: Measures to facilitate access to archives

Principle 17: Cooperation between archive departments and the courts and extrajudicial commissions of inquiry

Principle 18: Specific measures relating to archives containing names

IV. RIGHT TO JUSTICE

A. General principles

Principle 19: Purpose of the right to justice

Principle 20: Duties of States with regard to the administration of justice

B. Distribution of jurisdiction between national, foreign and international courts

Principle 21: Jurisdiction of national courts

Principle 22: Jurisdiction of foreign courts

Principle 23: Measures to strengthen the effectiveness of treaty provisions on universal jurisdiction

Principle 24: Measures to determine extraterritorial jurisdiction in internal law

Principle 25: Jurisdiction of international courts

Principle 26: Rules of procedure applicable in international courts

C. Restrictive measures justified by action to combat impunity

Principle 27: Scope of restrictive measures

Principle 28: Restrictions relating to prescription

Principle 29: Restrictions relating to amnesty

Principle 30: Restrictions relating to the right of asylum

Principle 31: Restrictions relating to extradition

Principle 32: Restrictions relating to the exclusion of *in absentia* procedure

Principle 33: Restrictions on the principle of due obedience and on the effects of legislation on repentance

Principle 34: Restrictions on the principle of the irremovability of judges

Principle 35: Restrictions on the jurisdiction of military courts

V. RIGHT TO REPARATION

A. General principles

Principle 36: Rights and duties arising out of the obligation to make reparation

Principle 37: Beneficiaries of the right to reparation

Principle 38: Reparation procedures

Principle 39: Publicizing reparation procedures

Principle 40: Scope of the right to reparation

B. Individual measures of reparation

Principle 41: Measures of restitution

Principle 42: Measures of compensation

Principle 43: Measures of rehabilitation

C. General measures of reparation

Principle 44: Measures of satisfaction

D. Guarantees of non-repetition

Principle 45: Areas affected by guarantees of non-repetition

Principle 46: Disbandment of unofficial armed groups directly or indirectly linked to the State and of private groups benefiting from its passivity

Principle 47: Repeal of emergency legislation and abolition of emergency courts

Principle 48: Administrative and other measures relating to State officials

Principle 49: Implementation of administrative measures

Principle 50: Nature of measures that can be taken against State officials

VI. INTERPRETATIVE PROVISION

Annex II

SET OF PRINCIPLES FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS THROUGH ACTION TO COMBAT IMPUNITY

I. PREAMBLE

Recalling the Preamble of the Universal Declaration of Human Rights, which states that disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind,

Aware that there is always a risk that such acts may occur,

Reaffirming the commitment made by the Member States under Article 56 of the Charter of the United Nations to take joint and separate action, giving full importance to developing effective international cooperation for the achievement of the purposes set forth in Article 55 of the Charter concerning universal respect for, and observance of, human rights and fundamental freedoms for all,

Considering that the duty of every State under international law to respect and to secure respect for human rights requires that effective measures should be taken to combat impunity,

Recalling the recommendation contained in paragraph 91 of Part II of the Vienna Declaration and Programme of Action, wherein the World Conference on Human Rights (June 1993) expressed its concern about the impunity of perpetrators of human rights violations and encouraged the efforts of the Commission on Human Rights and the Subcommission on Prevention of Discrimination and Protection of Minorities to examine all aspects of the issue,

Convinced, therefore, that national and international measures must be taken for that purpose with a view to securing jointly, in the interests of the victims of human rights violations, observance of the right to know, the right to justice and the right to reparation, without which there can be no effective remedy against the pernicious effects of impunity,

Decides, pursuant to the aforesaid recommendation of the Vienna Declaration and Programme of Action, solemnly to proclaim the following principles for the guidance of States having to combat impunity.

II. DEFINITIONS

A. Impunity

"Impunity" means the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to them being accused, arrested, tried and, if found guilty, convicted.

B. Reference period

"Reference period", as used in these principles, means the period of impunity delimited by fixed dates referring to events which marked the appearance and later cessation of a consistent pattern of gross violations of human rights.

C. Serious crimes under international law

This term, as used in these principles, covers war crimes, crimes against humanity and grave breaches within the meaning of the Geneva Conventions of 12 August 1949 and Additional Protocols I and II of 8 June 1977.

III. THE RIGHT TO KNOW

A. General principles

PRINCIPLE 1. THE INALIENABLE RIGHT TO THE TRUTH

Every society has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through the consistent pattern of gross violations of human rights, to the perpetration of aberrant crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of such acts in the future.

PRINCIPLE 2. THE DUTY TO REMEMBER

A people's knowledge of the history of their oppression is part of their heritage and, as such, shall be preserved by appropriate measures in fulfilment of the State's duty to remember. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.

PRINCIPLE 3. THE VICTIMS' RIGHT TO KNOW

Irrespective of any legal proceedings, the families of victims shall have the right to know the truth about the fate of their relatives. In cases of enforced disappearance or of abduction of children, this right shall be imprescriptible.

PRINCIPLE 4. GUARANTEES TO GIVE EFFECT TO THE RIGHT TO KNOW

To give effect to the right to know, States should take the following measures with a view to establishing extrajudicial commissions of inquiry and ensuring the preservation of, and access to, archives of the reference period.

B. Extrajudicial Commissions of Inquiry

PRINCIPLE 5. ROLE OF THE EXTRAJUDICIAL COMMISSIONS OF INQUIRY

The Extrajudicial Commissions of Inquiry shall have the task of establishing the facts so that the truth can be found. In order to restore

the dignity of the victims, families and human rights defenders, these investigations shall be conducted with the object of securing recognition of such truth as were constantly denied during the reference period.

PRINCIPLE 6. GUARANTEES OF INDEPENDENCE AND IMPARTIALITY

In order to found their legitimacy upon incontestable guarantees of independence and impartiality, the Commissions:

(a) Shall be established by law or, depending on the circumstances, by a contractual instrument concluding a process of national dialogue or a peace accord;

(b) Shall be constituted in accordance with criteria making clear to the public the impartiality of their members and on conditions ensuring their independence, in particular by the irremovability of their members for the duration of their terms of office.

PRINCIPLE 7. DEFINITION OF THE COMMISSIONS' TERMS OF REFERENCE

The terms of reference of the Commissions shall be set forth clearly and shall incorporate at least the following stipulations and limitations:

(a) They shall not have authority to act as substitutes for the courts, which shall alone have jurisdiction to establish individual criminal responsibility with a view to reaching a decision as to guilt and, where appropriate, passing sentence;

(b) Within the limits of the reference period, their investigations shall relate to all persons cited in allegations of human rights violations, whether they ordered them or actually committed them, acting as perpetrators or accomplices, and whether they are public officials or members of quasi-governmental or private armed groups, or of non-governmental armed movements having the status of belligerents; all other armed organized groups shall be treated as such;

(c) The Commissions shall have jurisdiction to consider all forms of human rights violations. Their investigations shall focus as a matter of priority on those violations appearing to constitute a consistent pattern of gross violations. They shall endeavour to analyse and describe the machinery of the State through which the violating system operated, to identify the administrations, agencies and private entities involved and reconstruct their roles, and to safeguard evidence for later use in the administration of justice.

PRINCIPLE 8. GUARANTEES FOR PERSONS IMPLICATED

Any persons implicated when the facts are established shall be entitled, especially if the Commission is permitted under its terms of reference to divulge their names, to the following guarantees based on the adversarial principle:

(a) The information must be corroborated by at least two sources;

(b) The person implicated shall have the opportunity to make a statement setting out his or her version of the facts or, within the time prescribed by the instrument establishing the Commission, to submit a document equivalent to a right of reply for inclusion in the file. The rules of evidence provided for in principle 18 (c) shall apply.

PRINCIPLE 9. GUARANTEES FOR WITNESSES AND VICTIMS

Steps shall be taken to guarantee the security and protection of witnesses and victims. If anonymity is deemed necessary in their interests, it may be allowed only on three conditions, namely:

(a) That it is an exceptional measure;

(b) That the Chairman and one member of the Commission were empowered, at the time of its establishment to examine requests for anonymity and make confidential inquiries about the identity of the witnesses in order to assure themselves, and therefore be able to guarantee to the other members of the Commission, that they are authentic;

(c) That reference is made in the report to the content of the testimony if it is accepted by the Commission.

PRINCIPLE 10. OPERATION OF THE COMMISSIONS

The Commissions shall be provided with:

(a) Transparent funding to prevent them from coming under suspicion;

(b) Sufficient material and human resources for their credibility not to be open to question.

PRINCIPLE 11. ADVISORY FUNCTIONS OF THE COMMISSIONS

The Commissions' terms of reference shall include provisions calling for them to make recommendations in their final reports.

These recommendations shall contain proposals aimed, inter alia, on the basis of the facts and of any responsibility that has been established, at encouraging the perpetrators of the violations to show their repentance in appropriate forms that would promote national reconciliation so that a pardon, a private act that is necessary to achieve just and lasting reconciliation, can later be legitimately granted.

The recommendations shall, in addition, set out legislative or other measures to put these principles into effect and to prevent any further violations. These measures shall primarily concern the army, police and justice system and the strengthening of democratic institutions.

PRINCIPLE 12. PUBLICIZING THE REPORT OF THE COMMISSIONS

For security reasons or in order to avoid pressure on witnesses and Commission members, the Commissions' terms of reference may stipulate that the inquiry shall be kept confidential. The final report, on the other hand, should always be made public and be disseminated as widely as possible.

Commission members shall be protected by immunity from any defamation or other proceedings that might be filed against them in connection with material contained in the report.

C. Preservation of and access to reference period archives

PRINCIPLE 13. MEASURES FOR THE PRESERVATION OF ARCHIVES

The right to know means that archives should be preserved. Technical measures of a protective nature shall be taken at the conclusion of the reference period to prevent the removal, destruction, concealment or falsification of the archives of the reference period.

These urgent measures shall be followed by legislative or other reforms permanently governing the storage and preservation of and access to the archives in accordance with the principles set out below; specific measures shall be taken in the case of archives containing names in accordance with principle 18.

Severe penalties shall be laid down for misappropriation of archives, especially with a view to negotiating payment for them.

PRINCIPLE 14. ADMINISTRATIVE MEASURES RELATING TO ARCHIVE INVENTORIES

Priority shall initially be given to drawing up inventories of the archives stored and ascertaining the reliability of existing inventories. Special attention shall be given to archives of places of detention, in particular when such places did not exist officially.

PRINCIPLE 15. ADMINISTRATION OF ARCHIVE CENTRES

Measures shall be taken to place each archive centre under the responsibility of a specifically designated person. If that person was already in charge of the archive centre during the reference period, he or she must be explicitly redesignated, subject to the modalities stipulated in principles 49 and 50.

PRINCIPLE 16. MEASURES TO FACILITATE ACCESS TO ARCHIVES

Access to archives shall be facilitated, in the interest of historical research in particular. Authorization formalities shall have the sole purpose of controlling access and may not be used for purposes of censorship.

PRINCIPLE 17. COOPERATION BETWEEN ARCHIVE DEPARTMENTS AND THE COURTS AND EXTRAJUDICIAL COMMISSIONS OF INQUIRY

The courts and extrajudicial commissions of inquiry, as well as the investigators reporting to them, shall have free access to archives. The argument of confidentiality may not be used to prevent access. In accordance with their sovereign powers of assessment, however, the courts and extrajudicial commissions of inquiry may decide, in exceptional circumstances, not to make certain information public if it might jeopardize proceedings in progress.

PRINCIPLE 18. SPECIFIC MEASURES RELATING TO ARCHIVES CONTAINING NAMES

(a) For the purposes of this principle, archives containing names shall be understood to be those archives containing information that make it possible, in any way whatsoever, directly or indirectly, to identify the individuals to whom they relate, regardless of whether such archives are on paper or in computer files.

(b) Everyone shall be entitled to know whether his or her name appears in the archives stored during the reference period, and, if it does, to use his or her right of access and subsequently to challenge the validity of the relevant information by exercising his or her right of reply. The document containing his or her own version shall be attached to the document being challenged.

(c) Except where it relates to officials of the security services or persons working with them on an ongoing basis, the information in the security and information service archives containing names shall not by itself constitute incriminating evidence, unless it is corroborated by several different reliable sources.

IV. RIGHT TO JUSTICE

A. General principles

PRINCIPLE 19. PURPOSE OF THE RIGHT TO JUSTICE

There can be no just and lasting reconciliation, as stated in principle 11, without an effective response to the need for justice; the prerequisite for any reconciliation is forgiveness, which is a private act that implies that the victim knows the perpetrator of the violations and that the latter has been able to show repentance. Over and above any verdict, that is the essential purpose of the right to justice.

PRINCIPLE 20. DUTIES OF STATES WITH REGARD TO THE ADMINISTRATION OF JUSTICE

Impunity is a failure of States to meet their obligations under international law to investigate violations, take appropriate measures in respect of the perpetrators, particularly in the area of justice, ensure that they are prosecuted and tried and provide the victims with effective remedies.

Although the decision to prosecute is primarily within the competence of the State, supplementary procedural rules should be set forth to enable any

victim to institute proceedings on his or her own behalf, especially in cases where the authorities fail to do so, or to become an associated party. This option shall be extended to non-governmental organizations able to show proof of long-standing activities for the protection of the victims concerned.

B. Distribution of jurisdiction between national, foreign and international courts

PRINCIPLE 21. JURISDICTION OF NATIONAL COURTS

As a rule, the national courts shall have jurisdiction. However, the subsidiary jurisdiction of a foreign court or concurrent jurisdiction of an international court may be accepted when, in view of the circumstances, the national courts are not yet in a position to respond satisfactorily to the justice requirements of a constitutional State or are physically unable to function.

PRINCIPLE 22. JURISDICTION OF FOREIGN COURTS

The subsidiary jurisdiction of foreign courts shall be exercised by virtue either of a provision on universal jurisdiction set forth in a treaty in force or of a provision of internal law establishing a rule of extraterritorial jurisdiction for serious crimes under international law.

PRINCIPLE 23. MEASURES TO STRENGTHEN THE EFFECTIVENESS OF TREATY PROVISIONS ON UNIVERSAL JURISDICTION

(a) A provision on universal jurisdiction applicable to serious crimes under international law should be included in all international human rights instruments dealing with such crimes;

(b) By ratifying such instruments, States pledge, pursuant to such a provision, to seek and prosecute the perpetrators of the crimes mentioned above when there are serious reasons to believe that such persons are in their territory, with a view to trying or extraditing them. They are consequently bound to take legislative or other measures under internal law to ensure the implementation of the provision on universal jurisdiction.

PRINCIPLE 24. MEASURES TO DETERMINE EXTRATERRITORIAL JURISDICTION IN INTERNAL LAW

In the absence of a ratification making it possible to apply such a provision to the country where the crime was committed, and notwithstanding the principle of sovereignty according to which States shall have recourse to criminal legislation only when there is a direct link - territorial or personnel - between the State and the crime, States shall take measures in their internal legislation to establish extraterritorial jurisdiction over serious crimes under international law which have been committed outside their territory, whatever the nationality of the perpetrator or the victim, and which by their nature are within the purview not only of internal criminal law but also of a system of international jurisdiction to which the concept of frontiers is alien.

PRINCIPLE 25. JURISDICTION OF INTERNATIONAL COURTS

To meet the need for justice effectively, a standing international criminal court should be set up with concurrent jurisdiction binding on all Member States. As a transitional measure, a court may be provided for in a treaty or ad hoc courts established.

Whenever an international court is seized for the purpose of trying the perpetrators of gross and systematic violations of human rights during the reference period, priority shall be given to prosecuting the perpetrators of serious crimes under international law.

PRINCIPLE 26. RULES OF PROCEDURE APPLICABLE IN INTERNATIONAL COURTS

The rules of procedure applicable in international courts shall conform to the provisions of articles 8 to 11 of the Universal Declaration of Human Rights and 9, 14 and 15 of the International Covenant on Civil and Political Rights with regard to the right to a fair hearing.

C. Restrictive measures justified by action to combat impunity

PRINCIPLE 27. SCOPE OF RESTRICTIVE MEASURES

Restrictive measures shall be taken in the legal areas which might favour impunity. The following areas in particular are concerned: prescription, amnesty, right to asylum, extradition, absence of in absentia procedure and due obedience, as well as legislation on repentance, the irremovability of judges and the jurisdiction of military courts.

PRINCIPLE 28: RESTRICTIONS RELATING TO PRESCRIPTION

The period during which no effective remedies against a criminal offence are in existence shall not count towards the prescription of the offence.

Prescription shall not be applicable to serious crimes under international law which, independently of the injury caused to the victim, constitute so grave an undermining of human dignity that they are by their very nature imprescriptible, in order to prevent the course of justice from being thwarted.

Prescription shall not be applicable to civil, administrative or disciplinary actions brought by victims seeking compensation for injury.

PRINCIPLE 29. RESTRICTIONS RELATING TO AMNESTY

When amnesty is intended to establish conditions conducive to a peace agreement or to foster national reconciliation, it shall be subject to the following rules:

(a) The perpetrators of serious crimes under international law and the perpetrators of gross and systematic violations may not be included in the amnesty as long as the victims have been unable to avail themselves of an effective remedy or to obtain a fair and effective decision;

(b) In so far as it may imply an admission of guilt, amnesty cannot be imposed on individuals prosecuted or sentenced for acts connected with the peaceful exercise of their right to freedom of opinion and expression. When they have done nothing but exercise this legitimate right, as guaranteed by articles 18 to 20 of the Universal Declaration of Human Rights and 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights, the law shall consider any judicial or other decision concerning them to be null and void; their detention shall be ended unconditionally and without delay;

(c) Any individual convicted of offences other than those laid down in paragraph (b) of this principle who comes within the scope of the amnesty is free to refuse it and request a retrial if he has been tried without benefit of the right to a fair hearing guaranteed by articles 10 and 11 of the Universal Declaration of Human Rights and articles 9, 14 and 15 of the International Covenant on Civil and Political Rights or if he has been subjected to inhuman or degrading interrogation, especially under torture.

PRINCIPLE 30. RESTRICTIONS RELATING TO THE RIGHT OF ASYLUM

Under article 1, paragraph 2, of the Declaration on Territorial Asylum, adopted by the General Assembly on 14 December 1967, and article 1 F of the Convention relating to the Status of Refugees of 28 July 1951, States may not extend such protective status, including diplomatic asylum, to persons with respect to whom there are serious reasons to believe that they have committed a serious crime under international law.

PRINCIPLE 31. RESTRICTIONS RELATING TO EXTRADITION

Unless they are likely to be subject to the death penalty in the requesting country, persons who have committed serious crimes under international law may not, in order to avoid extradition, avail themselves of the favourable provisions generally relating to political offences or of the principle of non-extradition of nationals.

PRINCIPLE 32. RESTRICTIONS RELATING TO THE EXCLUSION OF <u>IN ABSENTIA</u> PROCEDURE

Except for establishing a guarantee of impunity, non-recognition of <u>in absentia</u> procedure by a legal system should be limited to the sentencing stage to enable the necessary investigations, including the hearing of witnesses and victims, to be carried out and charges to be preferred, followed by wanted notices and arrest warrants, if necessary international, executed according to the procedures laid down in the Constitution of the International Criminal Police Organization (ICPO) - Interpol.

PRINCIPLE 33. RESTRICTIONS ON THE PRINCIPLE OF DUE OBEDIENCE AND ON THE EFFECTS OF LEGISLATION ON REPENTANCE

The fact that violations have been committed by a subordinate does not exempt his superiors from responsibility if they have failed to make use of the powers vested in them to prevent or halt the violation upon learning that it was being, or was about to be, committed.

The fact that the perpetrator of violations acted on the orders of his Government or of a superior does not exempt him from responsibility, including criminal responsibility, or constitute a mitigating circumstance, but is simply a reason for reducing the sentence.

Similarly, the fact that the perpetrator, after the reference period, reveals such violations or violations committed by others in order to benefit from the favourable provisions of laws on genuine repentance cannot exempt him from responsibility, including criminal responsibility. It may however be grounds for reducing the penalty in order to promote disclosure of the truth.

When the revelations have been made during the reference period, this mitigation may go so far as absolute discharge. In such cases, and notwithstanding principle 30, asylum, excluding refugee status, may be granted to the author of the revelations in order to facilitate disclosure of the facts during the reference period.

PRINCIPLE 34. RESTRICTIONS ON THE PRINCIPLE OF THE IRREMOVABILITY OF JUDGES

The principle of irremovability, as the basic guarantee of the independence of judges, must be observed in respect of judges who have been appointed in accordance with a procedure consistent with a constitutional State. Conversely, judges appointed by the Executive or who have derived their judicial power from an act of allegiance to the Executive power during the reference period may be relieved of their functions by the Executive in accordance with the principle of parallelism. They may ask to be afforded the guarantees laid down in principle 50 (d), in particular with a view to seeking reinstatement, where applicable.

PRINCIPLE 35. RESTRICTIONS ON THE JURISDICTION OF MILITARY COURTS

In order to avoid military courts, in those countries where they have not yet been abolished, helping to perpetuate impunity by virtue of a lack of independence resulting from the chain of command to which all or some of their members are subject, their jurisdiction must be limited solely to offences committed among military personnel.

V. RIGHT TO REPARATION

A. General principles

PRINCIPLE 36. RIGHTS AND DUTIES ARISING OUT OF THE OBLIGATION TO MAKE REPARATION

Any human rights violation gives rise to a right to reparation on the part of the victim and a duty on the part of the State to make reparation; this duty includes the obligation to afford guarantees of the non-repetition of the violations.

PRINCIPLE 37. BENEFICIARIES OF THE RIGHT TO REPARATION

Individual beneficiaries of this right are the victims themselves, their parents, their dependants and persons able to demonstrate a special relationship with the victim.

PRINCIPLE 38. REPARATION PROCEDURES

All victims shall have access to a readily available, prompt and effective remedy in the form of criminal, civil, administrative or disciplinary proceedings covered by the restrictions on prescription set out in Principle 29. This procedure shall afford them protection against intimidation and reprisals. Exercise of the right to reparation includes access to the applicable international procedures.

The right to reparation may be exercised collectively within the context of appropriate bilateral or inter-State procedures.

PRINCIPLE 39. PUBLICIZING REPARATION PROCEDURES

Procedures enabling victims to exercise their right to reparation should be given the widest possible publicity by private, as well as public, communications media. This dissemination should take place both within and outside the country, particularly in countries to which large numbers of victims have been forced into exile.

PRINCIPLE 40. SCOPE OF THE RIGHT TO REPARATION

The right to reparation shall cover all injuries suffered by the victim; it shall include individual measures concerning the right to restitution, compensation and rehabilitation, as well as general reparation measures such as measures of satisfaction and guarantees of non-repetition.

B. Individual measures of reparation

PRINCIPLE 41. MEASURES OF RESTITUTION

Restitution, the purpose of which shall be to re-establish for the victim the situation prevailing before the reference period, entails restoring, inter alia, the exercise of individual freedoms and the right to citizenship, to family life, to return to one's country, to employment and to property ownership.

PRINCIPLE 42. MEASURES OF COMPENSATION

Compensation shall be equal to the financially assessable value of all damage suffered, particularly:

(a) Physical or mental injury, including pain, suffering and emotional shocks;

(b) The loss of an opportunity, including educational opportunities;

(c) Material damage and loss of income, including loss of earnings;

(d) Attacks on reputation or dignity;

(e) Costs of legal assistance and valuations.

PRINCIPLE 43. MEASURES OF REHABILITATION

Measures of rehabilitation shall cover the cost of medical, psychological or psychiatric care, as well as social, legal and other services.

C. General measures of reparation

PRINCIPLE 45. MEASURES OF SATISFACTION

Symbolic measures shall be taken in the following areas as moral and collective reparation and to satisfy the duty to remember:

(a) Public recognition by the State of its responsibility;

(b) Official declarations restoring the dignity of the victims;

(c) Commemorative ceremonies, naming of public thoroughfares, monuments, etc.;

(d) Annual tribute to the victims;

(e) Inclusion in history textbooks and human rights training manuals of a faithful account of exceptionally serious violations committed during the reference period.

D. Guarantees of non-repetition

PRINCIPLE 45. AREAS AFFECTED BY GUARANTEES OF NON-REPETITION

The State shall take appropriate measures to ensure that the victims are not again confronted with violations which undermine their dignity. Priority consideration shall be given to:

(a) Measures to disband parastatal armed groups;

(b) Measures repealing emergency provisions, legislative or otherwise, which have been conducive to violations;

(c) Administrative or other measures concerning State officials who assumed responsibilities in that regard during the reference period.

PRINCIPLE 46. DISBANDMENT OF UNOFFICIAL ARMED GROUPS DIRECTLY OR INDIRECTLY LINKED TO THE STATE AND OF PRIVATE GROUPS BENEFITING FROM ITS PASSIVITY

In order to ensure their effective disbandment, the measures to be taken shall be first and foremost in the following areas:

(a) Reconstruction of organizational structure by identifying operatives so as to reveal their position, if any, in the administration, particularly in the army and the police, and by determining the covert links which they maintained with their active or passive partners, particularly in the information and security services or in pressure groups;

(b) Thorough investigation of the information and security services with a view to redefining their functions;

(c) Securing the cooperation of third countries which might have contributed to the creation and development of such groups, particularly by providing financial or logistical support;

(d) Drawing up a recycling plan to ensure that members of such groups are not tempted to join the ranks of organized crime.

PRINCIPLE 47. REPEAL OF EMERGENCY LEGISLATION AND COURTS

Emergency legislation and courts of any type adopted or set up during the reference period must be repealed or abolished in so far as they infringe the fundamental rights and freedoms guaranteed in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Habeas corpus, whatever name it may be known by, must be considered a fundamental right of the individual and as such an inalienable right.

PRINCIPLE 48. ADMINISTRATIVE AND OTHER MEASURES RELATING TO STATE OFFICIALS

These measures are of a preventive and non-punitive character; they may therefore be taken by administrative decision, provided that the implementation procedures are provided for by legislation or by a contractual agreement instrument resulting from a process of national dialogue or by a peace accord, as the case may be.

They are intended to avoid any administrative obstacle or challenge to the process of restoring, or the transition to, peace and/or democracy initiated at the end of the reference period.

They are therefore quite distinct from the punitive and judicial measures provided for in principles 19 et seq. to be applied by the courts to persons prosecuted and tried for human rights violations.

PRINCIPLE 49. IMPLEMENTATION OF ADMINISTRATIVE MEASURES

Implementation should be preceded by an inventory of positions of responsibility with important decision-making power and therefore an obligation of loyalty to the process in progress. In the inventory, priority should be given to positions of responsibility in the army, the police and the judiciary.

In assessing the situation of each serving official, consideration will be given to:

(a) His background as regards the rule of law prevailing during the reference period, particularly in the human rights field;

(b) Non-involvement in corruption;

(c) Professional competence;

(d) Skill in promoting the peace and/or democratization process, particularly with regard to the observance of constitutional guarantees and human rights.

Decisions shall be made under the responsibility of the head of Government, on the reasoned proposal of the supervising minister after the official concerned has been informed of the complaints against him and has been given a due hearing.

The official may appeal to the appropriate administrative court.

However, in view of the special circumstances inherent in any transition period, the appeal may be heard by an ad hoc commission with exclusive jurisdiction, provided that it meets the criteria of independence, impartiality and procedure laid down in principles 6, 7 (a), 8 (a) and (b) and 10.

PRINCIPLE 50. NATURE OF MEASURES THAT CAN BE TAKEN AGAINST STATE OFFICIALS

Except where he has been confirmed in his position, the official concerned may be:

(a) Suspended pending his confirmation or appointment to another post;

(b) Transferred;

(c) Demoted;

(d) Offered early retirement;

(e) Dismissed.

In the case of judges, the decision shall be taken in the light of the relevant provisions of principle 35.

VI. INTERPRETATIVE PROVISION

The definition of the "reference period" may not be interpreted as exonerating or having exonerated States from applying and observing these principles during the said period.